LIJAW THEY HEW

v.

CHUA BOK KEE

HIGH COURT MALAYA, SHAH ALAM
FAIZA TAMBY CHIK J
[CIVIL APPEAL NO: RS-11-25 OF 1996]
12 JUNE 1998

CIVIL PROCEDURE: *Appeal - Adducing of fresh evidence - Events after trial but before appeal - Conditions to be fulfilled to justify reception - Whether such conditions fulfilled - Courts of Judicature Act 1964, ss. 29 & 69(3)*

EVIDENCE: *Fresh or further evidence - Admission of, on appeal - Appellate court's power to receive - Events after trial but before appeal - Conditions to be fulfilled - Courts of Judicature Act 1964, ss. 29 & 69(3)*

The respondent had instituted an action in the Magistrate's Court for vacant possession of a building it owned but which was occupied by the appellant. The respondent obtained judgment and the appellant appealed against the decision of the magistrate. The judgment however was executed and the appellant was forced to move out of the said building on 2 April 1996.

After execution was completed and vacant possession granted and a large part of the building was brought down leaving a dilapidated and dangerous structure behind, the appellant obtained an order to set aside the execution.

At the appeal, the respondent applied (the instant application) for leave to admit evidence that the execution had already been carried out and that the condition of the building was unfit and even dangerous for human habitation. By notice dated 10 May 1996, the Majlis Daerah Ulu Langat had ordered that the building be brought down as it was dangerous to public safety.

The issue for consideration was whether fresh evidence could be admitted at the appellate stage in the High Court, in particular evidence relating to events which occurred after trial but before the disposal of the appeal.

Held:

[1] Fresh evidence may be admitted at the appellate stage in the High Court provided the following conditions are fulfilled, namely: (i) that such evidence could not have been obtained with reasonable diligence for use at the trial; (ii) that such evidence, if given, would probably have an important influence on the result of the case, although it need not be decisive; and (iii) that such evidence must be apparently credible, although it need not be incontrovertible.

[2] In this case, the evidence was of such a nature that the court had to consider it when deciding the appeal proper. The court could not ignore the fact that the building, a rent-controlled one, was no longer in habitable condition.

[Application allowed.]

Cases referred to:
Curwen v. James [1963] 2 All ER 619 ***(foll)***
Ladd v. Marshall [1954] 3 All ER 745 ***(foll)***
Lau Soon Sun v. Government of Malaysia [1970] 2 MLJ 70 ***(foll)***
McCann v. Sheppard [1973] 2 All ER 881 ***(foll)***
Mulholland v. Mitchell [1971] 1 All ER 307 ***(foll)***
Murphy v. Stone Wallwork (Charlton) Ltd [1969] 2 All ER 949 ***(foll)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 29, 69(3)

For the appellant - M/s Poi Tzse Meng & Co
For the respondent - M/s Watson Peters & Mohd Fuad

Reported by Mariette Peters-Goh

JUDGMENT

Faiza Tamby Chik J:

This is an application for an order that the plaintiff/respondent be at liberty upon the hearing of defendant/appellant's appeal to adduce further evidence.

It is trite law that fresh evidence may be admitted at the appellate state in the High Court (see s. 29 of the Courts of Judicature Act 1964 (CJA) read together with s. 69(3) of the CJA). Further the principles enunciated in *Ladd v. Marshall* [1954] 2 All ER 745 have been adopted and applied by the then Federal Court in *Lau Soon Sun v. Government of Malaysia* [1970] 2 MLJ 70. In *Lau Soo Sun (supra)* Suffian FJ (as he then was) said:

To justify the reception of this evidence three conditions must be fulfilled:

(i) It must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;

(ii) The evidence must be such that, if given, it would probably have an important influence on the result of the case, although it need not be decisive; and

(iii) The evidence must be such as is presumably to be believed, or in other words, it must be apparently credible, although it need not be incontrovertible.

These were the tests enunciated by Denning LJ (as he then was) at p. 748 in *Ladd v. Marshall* [1954] 3 All ER 745.

The question here is a further one as to whether evidence relating to events which occurred after trial but before disposal of the appeal can be admitted at the appeal state.

In *Curwen v. James* [1963] 2 All ER 619, the facts were briefly these. In June 1959, the deceased was killed in a motor accident. His widow brought an action for damages under the Fatal Accidents Act. The action was heard in January 1962 when the widow, who had no children, was aged 24. The trial judge awarded damages to the widow without providing any diminution in the amount of damages on account of remarriage of the widow. In March 1962, before the expiry of the time for giving notice of appeal she remarried. On appeal by the defendant against the amount of damages, the defendant sought to have the Court of Appeal adduce evidence of the widow's remarriage on the ground that, that if leave was granted, the defendant would contend that, by her remarriage, the widow had not lost the financial support as assessed by the judges. The Court of Appeal held that although the remarriage occurred after the trial, evidence of it would be allowed and that the damages would have to be reduced. As Harman LJ said in the same case:

> Why should we, when we know that the plaintiff had married, pretend that we do not know it and assess the damages, as we are assessing them anew here, on the footing that she may or may not marry? As we know the truth, we are not bound to believe in a fiction.

It is to be noted however that in this case the new event of remarriage occurred before the expiry of the time for giving notice of appeal.

In the case of *Murphy v. Stone Wallwork (Charlton) Ltd* [1969] 2 All ER 949, the House of Lords again decided to admit evidence of matters that occurred after trial but before hearing of the appeal. As a matter of fact, in this case the new evidence was allowed after the appeal in the Court of Appeal but before the appeal in the House of Lords. In this case, the appellant was injured at work and he brought an action against his employers, the respondent. In 1967 he was awarded damages by the court of first instance. On appeal in 1968, the Court of Appeal increased the award. Throughout the period the respondent continued to employ the appellant. Shortly after the judgment of the Court of Appeal, the respondent dismissed the appellant on the grounds that in his weak condition he might represent a danger to his fellow employees. The dismissal was entirely *bona fide*. The appellant appealed against the decision of the Court of Appeal and sought leave to adduce fresh evidence (ie, as to his dismissal). The House of Lords held that even at that stage it had the power to admit fresh evidence.

In *Mulholland v. Mitchell* [1971] 1 All ER 307, the House of Lords gave leave to adduce fresh evidence on matters that occurred after trial but before the hearing of the appeal. Here, the respondent had been awarded damages for injuries sustained as a result of a road accident. Damages were assessed on the basis, *inter alia*, that it would be possible for him to be looked after at home or in an ordinary nursing home. He appealed to the Court of Appeal against the award of damages. While the appeal was pending an application was made to adduce fresh evidence on the ground that the respondent's mental condition had subsequently and unexpectedly deteriorated to such an extent that he needed specialist care in a psychiatric home and that the cost of nursing would be about double the original estimate at trial. The House of Lords upheld the decision of the Court of Appeal and allowed the fresh evidence.

In *McCann v. Sheppard* [1973] 2 All ER 881, the Court of Appeal had to consider a similar question. The plaintiff was severely injured in a motor accident. In June 1972, he was awarded damages by the court of first instance. In July 1972, the defendant appealed seeking a reduction of the award. In October 1972, the plaintiff died of a drug overdose. At the hearing of the appeal later, the defendant sought to introduce as fresh evidence the fact that the plaintiff had died. The Court of Appeal held that despite the fact that the plaintiff had died after the trial, that fact was admissible at the appeal state.

It is to be observed that in all the four cases cited above, evidence of matters or events or circumstances that occurred after trial but before disposal of the appeal were allowed as fresh evidence.

In the instant case, here too evidence of some events and circumstances that occurred after trial is sought to be admitted.

The brief facts are as follows. The respondent instituted an action in the Magistrate's Court Kajang for vacant possession of a building owned by the respondent and occupied by the appellant. After trial, by order of court dated 1 October 1993, judgment was pronounced in favour of the respondent. The appellant appealed against the decision of the learned magistrate.

Following a writ of possession and with the aid of the bailiff of the Kajang court, the judgment was executed and the appellant was forced to move out of the said building on 2 April 1996. After execution was completed and vacant possession granted and a large part of the building was brought down leaving a rather dilapidated and dangerous structure behind, the appellant obtained an order to set aside the execution.

The evidence that the respondent seeks leave to admit is that the execution has already been carried out and that the condition of the building is that it is unfit and even dangerous for human habitation. As a matter of fact, by a notice dated 10 May 1996, the Majlis Daerah Ulu Langat ordered that the building be brought down as it was dangerous to public safety (see exh. CKB-9).

It is submitted that the evidence is of such a nature that the court has to consider it when deciding the appeal proper. To ignore the completed execution and the state of the building would as in the words of Lord Willberforce in *Mulholland's* case: "Negatively, fresh evidence ought not to be admitted when it bears on matters falling within the field or area of uncertainty, in which the trial judge's estimate has previously been made. Positively, it may be admitted, if some basic assumptions, common to both sides, have been clearly falsified by subsequent events, particularly if this has happened by the act of the defendant. Positively, too, it may be expected that courts will allow fresh evidence when to refuse it would affront common sense, or a sense of justice."

Just as the Court of Appeal could not shut its eyes to the re-marriage of the widow in *Curwen v. James,* just as the House of Lords could not shut its eyes to the subsequent dismissal of the appellant in *Murphy's* case, just as the House of Lords could not shut its eyes on the subsequent death of the plaintiff in *McCann's* case. I am of the opinion that this court should not shut its eyes from the fact that the building, a rent-controlled one, is no longer there in any habitable condition. The present case seems to me to come within the words of Lord Willberforce in *Mulholland's* case that "it would affront common sense" if we shut our eyes to the fact of dilapidation of the building and the notice issued by the Majlis Daerah Ulu Langat dated 10 May 1996 (exh. CKB-9).

In the circumstances the court allows the plaintiff/respondent leave to adduce the further evidence for consideration at the appeal proper.